

**\*E-FILED: January 23, 2012\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

D & I INVESTMENT, INC.,

No. C11-06132 HRL

Plaintiff,  
v.

**ORDER THAT CASE BE REASSIGNED  
TO A DISTRICT JUDGE**

ROSIE LUCIW; DOES 1-20,

**REPORT AND RECOMMENDATION RE  
MOTION TO REMAND TO STATE  
COURT**

Defendants.

In December 2011, defendant Rosie Luciw removed this unlawful detainer case from Santa Clara County Superior Court. Plaintiff D&I Investment, Inc. moves to remand. Defendant did not file an opposition to the motion. This court finds the matter suitable for determination without oral argument, and the January 31, 2012 hearing is vacated. CIV. L.R. 7-1(b). For the reasons stated below, the undersigned recommends that plaintiff's motion be granted and that this action be remanded to the state court.

Removal to federal court is proper where the federal court would have original subject matter jurisdiction over the complaint. 28 U.S.C. § 1441. "If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court *shall* make an order for summary remand." 28 U.S.C. § 1446(c)(4) (emphasis added). These removal statutes are strictly construed against removal and place the burden on the defendant to demonstrate that removal was proper. Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241,

1 1244 (9th Cir. 2009) (citing Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)).

2 Here, plaintiff points out that removal was untimely under 28 U.S.C. § 1446(b) because  
3 it was made more than 30 days after defendant was served with the complaint and summons.

4 See Hoffman Decl. ¶4.

5 Even if removal were timely, however, defendant has failed to show that removal is  
6 proper on account of any federal substantive law. The Notice of Removal asserts that plaintiff  
7 violated federal law in pursuing its unlawful detainer action. Federal courts have original  
8 jurisdiction over civil actions “arising under the Constitution, laws, or treaties of the United  
9 States.” 28 U.S.C. § 1331. A claim “arises under” federal law if, based on the “well-pleaded  
10 complaint rule,” the plaintiff alleges a federal claim for relief. Vaden v. Discovery Bank, 129 S.  
11 Ct. 1262, 1272 (2009). Defenses and counterclaims asserting a federal question do not satisfy  
12 this requirement. Id. The record indicates that plaintiff’s complaint presents claims arising  
13 only under state law and does not allege any federal claims whatsoever. Defendant’s  
14 allegations in a removal notice or in a response to plaintiff’s complaint cannot provide this court  
15 with federal question jurisdiction.


16 Nor does this court have diversity jurisdiction over the matter. Defendant does not  
17 establish diversity of citizenship in her removal notice; and, a review of the complaint shows  
18 that it specifies that the amount of claimed damages does not exceed \$10,000.00. (Complaint at  
19 1). In any event, as a California defendant, Luciw cannot remove this action to federal court  
20 under diversity jurisdiction. 28 U.S.C. § 1441(b) (stating that an action is removable for  
21 diversity “only if none of the parties in interest properly joined and served as defendants is a  
22 citizen of the State in which such action is brought”); Spencer v. U.S. Dist. Ct., 393 F.3d 867,  
23 870 (9th Cir. 2004) (“It is thus clear that the presence of a local defendant at the time removal is  
24 sought bars removal.”).

25 Because the parties have yet to consent to the undersigned’s jurisdiction, this court  
26 ORDERS the Clerk of the Court to reassign this case to a District Judge. The undersigned  
27 further RECOMMENDS that the newly assigned judge grant plaintiff’s motion and remand the  
28 case to Santa Clara County Superior Court. Pursuant to Federal Rule of Civil Procedure 72(b),

any party may serve and file objections to this Report and Recommendation within fourteen days after being served.

SO ORDERED.

Dated: January 23, 2012

  
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HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

**United States District Court**  
For the Northern District of California

1 5:11-cv-06132-HRL Notice has been electronically mailed to:

2 Kirkman Jan Hoffman kirk@kirkhoffman.com

3 5:11-cv-06132-HRL Notice sent by U.S. Mail to:

4 Rosie Luciw  
4040 Hidden Valley Lane  
5 San Jose, CA 95127

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